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SUPREME COURT, U.S.

No. 14-7955

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES F. WARNER; RICHARD E. GLOSSIP; JOHN M. GRANT; and BENJAMIN R. COLE, by and through his next friend, Robert S. Jackson,

Petitioners,

vs.

KEVIN J. GROSS; MICHAEL W. ROACH; STEVE BURRAGE; GENE HAYNES; FRAZIER HENKE; LINDA K. NEAL; EARNEST D. WARE; ROBERT C. PATTON and ANITA K. TRAMMELL,

Respondents.

CAPITAL CASE
EXECUTION OF CHARLES WARNER
SCHEDULED FOR 6:00 PM (CST)
THURSDAY, JANUARY 15, 2015

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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January 14, 2015

QUESTIONS PRESENTED

Question 1: Should this Court grant certiorari to review the Tenth Circuit's proper application of this Court's holding in *Baze*, as well as the Tenth Circuit's decision to affirm the district court finding that the first drug created a virtual certainty that the offender would rendered unconscious and able to resist the noxious stimuli of the second and third drugs?

Question 2: Should this Court grant certiorari to determine that the *Baze* standard applies when states are not using a protocol that implements the use of sodium thiopental as the first drug?

Question 3: Should this Court grant certiorari to re-emphasize that a prisoner must establish the availability of an alternative drug formula when challenging a state's method of execution?

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Respondents respectfully urge this Court to deny the petition for writ of certiorari to review the published opinion of the United States Court of Appeals for the Tenth Circuit, entered in this case on January 12, 2015, *Warner. v. Gross*, 2015 WL 137627.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at ___ F.3d ___, 2015 WL 137627. The district court's ruling denying Petitioners' Motion for Preliminary Injunction is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2015. The petition for writ of certiorari was filed on January 14, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PROCEDURAL HISTORY

Petitioners are death row inmates set for execution on January 15, 29, February 19, and March 5, 2015. (Dist. Ct. ECF No. 71-1). The Tenth Circuit noted that Petitioner Warner raped and murdered an eleventh month-old baby, Petitioner Glossip arranged for the beating death of his employer, Petitioner Grant stabbed a correction worker to death, and Petitioner Cole bent his nine month-old daughter in half, breaking her spine, killing her. (Pet. App. A at 3-4). Petitioners filed suit against Respondents in their official capacity on June 25, 2014, challenging the constitutionality of the execution protocol of the Oklahoma Department of Corrections ("ODOC"). Petitioners sought declaratory and injunctive relief. (Dist. Ct. ECF No. 75).

Petitioners claimed that the execution protocol would violate the Eighth Amendment by (1) executing Petitioners with the same drugs and procedures used in a previous execution, (2) using midazolam in Petitioners' executions, (3) would violate the Eighth Amendment by using compounded drugs in Petitioners' executions, (4) would violate the Eighth Amendment by using unsound procedures and inadequate training, (5) would violate due process and access to courts by not providing proper notice regarding how Petitioners would be executed, (6) would violate *ex post facto*, (7) would violate the Eighth Amendment by conducting human experimentation, and (8) would violate Petitioners' access to courts, counsel, and government. *Id.*

Over five (5) months after initiating their lawsuit, Petitioners filed a motion for preliminary injunction on November 10, 2014, regarding claims 2, 4, 5, 7, and 8, requesting that

the District Court stay the four scheduled executions. (Dist. Ct. ECF No. 92). The district court provided wide latitude for Petitioners to pursue discovery, and then held a three-day hearing on Petitioners' motion, and determined that Petitioners failed to establish the elements required for a preliminary injunction. (Dist. Ct. ECF Nos. 172, 173 and 179). Petitioners then appealed that denial to the Tenth Circuit Court of Appeals, claiming that the District Court abused its discretion in denying Petitioners' motion for preliminary injunction. (Dist. Ct. ECF No. 176). Petitioners also filed a motion for a stay of execution at the Tenth Circuit. (10th Cir. ECF No. 01019367079, filed Jan. 8, 2015).

The Tenth Circuit affirmed the district court, finding that the district court did not abuse its discretion in denying Petitioners' requested preliminary injunction. Petitioners then filed their petition for a writ of certiorari in this Court.

STATEMENT OF THE CASE

Petitioners request that this Court revisit *Baze v. Rees*, not because of a circuit split, not on account of misapplications of *Baze*, but merely because they disagree with the consistent results that have stemmed from the *Baze* decision. While Petitioners claim "multiple malfunctioning executions," it is undisputed that Oklahoma's protocol, which is identical to Florida's protocol, has been used 10 times in executions without serious incident.[1] Petitioners can only cite to executions that took place using different drug combinations, or the Oklahoma execution of Offender Lockett, in which IV access was subsequently found to be insufficient and

[1] The record below reflects that Florida has used this method 11 times. However, Respondents have only been able to determine that Florida has used the method 10 times.

flawed.[2] This leaves Petitioners with no basis for revisiting *Baze* in this case, other than the obvious basis: Petitioners' claims cannot succeed under this Court's established precedent.

A. OKLAHOMA'S EXECUTION PROTOCOL

The State of Oklahoma will execute Petitioners using an execution protocol which utilizes 500 milligrams of midazolam, 100 milligrams of rocuronium bromide, and 240 milliequivalents of potassium chloride. Midazolam is a sedative that renders the offender unconscious, after which the other two drugs are injected, causing death. This particular method has been implemented in the State of Florida 10 times, but has not yet been used in Oklahoma.[3]

B. OKLAHOMA'S CHOICE OF MIDAZOLAM

As several courts, including the district court, have noted, states that employ capital punishment by lethal injection have struggled to obtain the necessary chemicals to conduct executions, largely due to political or extra-legal pressures exerted by opponents of the death penalty. As a result of this war of attrition, the selection of drugs available to the states has dwindled. Still, the State of Oklahoma always attempts to obtain and employ the most humane drugs available. While Petitioners decry the State's process for choosing midazolam, and allege all manner of dastardly reasons for that choice, the State chose midazolam because it had been shown to work, and work effectively. Florida has established an impressive track record of successful executions using midazolam. That fact alone makes that method a logical and workable choice, especially since, unlike sodium thiopental and pentobarbital, midazolam was actually available. As a result, Oklahoma chose to emulate Florida's method going forward, as long as sodium thiopental and pentobarbital remain unavailable. Contrary to Petitioners'

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[2] The State of Oklahoma also used 100 milligrams of midazolam, as opposed to the 500 milligrams now required by the protocol.

[3] The State has used a three-drug protocol using midazolam once, in the Lockett execution. However, that protocol only used 100 milligrams of midazolam, one-fifth of the amount designated in the current protocol.

breathless accusations of convenience and political expediency, Oklahoma chose midazolam because the State has a sacred duty to enforce its criminal judgments, and the protocol pioneered by Florida represents the best available mechanism to carry out these judgments.

C. THE DISTRICT COURT DECISION

In June of 2014, Petitioners filed their lawsuit, challenging Oklahoma's execution protocol. (Dist. Ct. ECF No. 1). The protocol was revised on September 30, 2014, following an in-depth investigation by the Oklahoma Department of Public Safety into the execution of Offender Lockett. (Dist. Ct. ECF No. 55). Petitioners filed an Amended Complaint, but still did not file a motion for preliminary injunction until early November 10, 2014, only after the district court set a deadline for them to request a stay. (Dist. Ct. ECF Nos. 75, 79, 92). In preparation for the hearing, Respondents and other state agencies provided over 15,000 pages of documents in discovery. (Dist. Ct. ECF No. 149). Petitioners misquote and misstate a key issue of the district court's opinion. Petitioners state that the district court did find that the use of midazolam increases the risk of pain. This is a misrepresentation, as the district court only acknowledged that there *may* be some greater risk. (Pet. App. C at 44:25-45:7). The district court stopped short of finding that there was a greater risk created by Oklahoma's execution protocol. Also, Petitioners fail to acknowledge that the possible risk was referenced in comparison to the two unavailable drugs, not in comparison to any alternatives actually available.

In fact, the district court acknowledged that a court is not to sit as a "board of inquiry charged with determining best practices for executions," and noted that any asserted risk regarding midazolam was cured by the fact that Oklahoma's protocol required primary and secondary IV lines, required confirmation of the viability of IV sites, and required that the offender's consciousness level be monitored throughout the procedure. *Id.* at 45:14-18, 66:1-19.

Furthermore, the district court determined that Petitioners had failed to show that there was a known and available alternative to the method chosen by the State of Oklahoma. *Id.* 66:25-67:10. In reaching that conclusion, the district court relied on authority from the Eighth, Fifth, and Sixth Circuit Courts of Appeal. *Id.* at 67:11-69:5. The district court accordingly denied Petitioners' request for a preliminary injunction, and Petitioners appealed to the Tenth Circuit.

D. THE TENTH CIRCUIT DECISION

The Tenth Circuit reviewed the district court's ruling under the proper abuse of discretion standard. The Tenth Circuit reviewed the district court's factual findings in depth, and was unable to "say that any of these factual findings are clearly erroneous, despite Petitioners' voracious attack on the State's expert witness, Dr. Lee Evans." *Id.* at 27. The Tenth Circuit was careful to note that Petitioners did not actually claim that the district court failed to make adequate *Daubert* findings regarding Dr. Evans' testimony. *Id.* at 25. Instead, Petitioners focused on ancillary mistakes by Dr. Evans that the Tenth Circuit determined did *not* "seriously undercut the key portions of Dr. Evans' testimony that were relied on by the district court." *Id.* at 27.

While the Tenth Circuit spent a significant amount of time addressing Petitioners' strident smear campaign against Dr. Evans, the Tenth Circuit also addressed the inaccuracies in Petitioners' misguided legal theory. *Id.* at 18. The Tenth Circuit first rejected Petitioners' argument that they have no obligation to show that a known and readily available alternative to the State's protocol exists. *Id.* at 19-20. The Tenth Circuit observed that the Circuit's own precedent, which Petitioners noticeably failed to reference, foreclosed that argument. *Id.* at 19-20, 19 n.8. The Tenth Circuit further noted that the Eight Circuit is in agreement with the Tenth, and that this Court has never indicated that the approach is in error. *Id.* at 20, 20 n. 9. The Tenth

Circuit then rejected Petitioners' argument that the standards in *Baze* were somehow inapplicable to the current case, as the *Baze* standard was applicable to "all challenges to 'a State's chosen procedure for carrying out a sentence of death.'" *Id.* at 21 (citing *Baze v. Rees*, 553 U.S. 35, 48 (2008)).

The Tenth Circuit also rejected Petitioners' arguments that the district court should not have relied on the requirements of primary and secondary IV lines, the required confirmation of the viability of IV sites, and the requirement that the offender's consciousness level be monitored throughout the procedure. *Id.* The Tenth Circuit recognized, in spite of Petitioners' conflation of the issues, that the district court's reliance on those factors went not to the inherent characteristics of midazolam, but to the risk of improper administration. *Id.* Finally, the Tenth Circuit rejected Petitioners' claims that reports of prisoner movements in the Florida executions rendered the protocol objectively intolerable under evolving standards of decency. *Id.* at 21-22. The Tenth Circuit noted that "[n]othing in *Baze*...supports these arguments." *Id.* at 22.

The Tenth Circuit rejected Petitioners claims and affirmed the district court. As a final note, at the Tenth Circuit, Petitioners sought to bolster their arguments from the district court by submitting "declarations" or "reviews" from their experts, attempting to affect a sort of post-hearing, hearsay impeachment of the State's expert witness, and have repeated this misplaced attempt now in this Court. (Pet. Apps. F, G). These two hearsay-ridden affidavits, created and presented outside of the fact-finding process, (never subjected to proper cross-examination by opposing counsel herein or to any review at all by the district court and his own inquiry), are wholly improper and suggest that these Petitioners, rather than being interested in efficient and proper administration of justice, seek only to distract from the facts and legal issues properly before the courts.

REASONS FOR NOT GRANTING THE WRIT

Petitioners' current action appears to be little more than yet another successive habeas action, one to which they should not be entitled in the first place. Petitioners attempt to frame the current capital punishment situation as something new, novel, or ground-breaking. This is inaccurate. As noted several times, this particular method of execution has been examined in state and federal courts in the State of Florida. *Chavez v. Florida SP Warden*, 742 F.3d 1267 (11th Cir. 2014); *Muhammad v. Florida*, 132 So.3d 176 (Fla. 2013). This Court has already had the opportunity to weigh in on this particular protocol twice, and has declined to do so each time. *Muhammed v. Florida*, 134 S.Ct. 894 (2014); *Chavez v. Palmer*, 134 S.Ct. 1156 (2014). In fact, it appears that Florida's protocol is so well-established that an inmate scheduled for execution in Florida on January 15, 2015, has not even filed a challenge to Florida's method.

Further, Petitioners seem to find fault with states (and their legal counsel) using *Baze* as a guide in crafting execution protocols, as if relying on this Court's precedent to fulfill their constitutional duties is somehow nefarious or unseemly. Finally, Petitioners claim this Court must give "urgently needed guidance." This statement is particularly unsupported, considering courts have been remarkably consistent in their application of the *Baze* standard, demonstrating that the standard is clear, consistent, and understood. The only inconsistency which exists in this case arises from Petitioners' own miscomprehensions regarding the requirements of *Baze*, which they flatly refused to comply with at the district court.

A. PETITIONERS' EIGHTH AMENDMENT CHALLENGE FAILS TO PRESENT A COMPELLING FEDERAL ISSUE OR CONFLICT OF FEDERAL LAW THAT WARRANTS RESOLUTION BY THIS COURT.

Petitioners fail to point to any instance where the circuit courts of appeal are in disagreement concerning what *Baze* requires. Petitioners also fail to point out any inconsistency

among courts regarding how they interpret or apply *Baze*. In addition, this Court has had numerous opportunities since deciding *Baze* to clarify any misapplication by lower courts, and has in every instance declined to address the issue. The historical consistency with which multiple and varying courts have applied the *Baze* standard is evidence enough that the standard is reliable and clear.

In addition to a lack of conflict regarding *Baze*, there is no compelling federal issue implicated by this matter. While Petitioners make much of the evolving execution protocols, the bedrock inquiry has not changed. Under *Baze*, a protocol is constitutional unless there is a demonstrated risk of serious harm that is substantial when compared to the known and available alternatives. *Baze*, at 61. Petitioners try to limit that standard to only protocols that are similar to the protocol in *Baze*, but *Baze* is much broader, and encompasses every method that a state uses to enforce capital sentences. The very reason that *Baze* has endured without conflict as to its interpretation is that the standard is clear and applicable in every situation. No matter how a state might change its protocol, they must conform the protocol to the *Baze* standard.

B. PETITIONERS' REQUEST AMOUNTS TO A REQUEST FOR THIS COURT TO SUBSTITUTE ITS JUDGMENT FOR THE DISTRICT COURT'S FINDINGS OF FACT AND CREDIBILITY DETERMINATIONS.

Disagreement with the factual findings of a district court is an insufficient basis for appeal. This Court has held that "if the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573-74 (1985). The district court's account of the evidence is more than plausible. However, while not explicitly claiming that the district court was factually in error, Petitioners claim that this protocol is different than the protocol in *Baze* because midazolam cannot reliably create a deep, coma like

unconsciousness. This is, in fact, a factual contention that attacks the heart of the district court's findings. The district court determined that the administration of 500 milligrams of midazolam made it a "virtual certainty that any individual will be at a sufficient level of unconsciousness to resist the noxious stimuli which could occur from the application of the second and third drugs." (Pet. App. C at 42:4-8). Therefore, any claim that there is a difference between the *Baze* protocol and Oklahoma's protocol is a challenge to the district court's finding of fact, and is a distinction without a difference. The district court's factual determinations were clearly plausible and in accordance with *Baze*. Any challenge to those determinations made by the district court, therefore, is improper as a basis of appeal and is unwarranted under the applicable legal and factual standards.

C. THE TENTH CIRCUIT'S APPLICATION OF THE *BAZE* STANDARD IS PROPER.

Petitioners claim that the Tenth Circuit's requirement that they show a known and available alternative is not consistent with the evolving standards of decency precedents of this Court. Petitioners claim that the Tenth Circuit requires this showing even if the method of execution is unconstitutional. This allegation shows Petitioners' clear lack of understanding of this Court's Eighth Amendment jurisprudence. As this Court has observed many times, capital punishment is constitutional, therefore states *must* have a way to carry out that punishment. *Baze*, at 47. Therefore, alternative availability is a key component to whether a method is unconstitutional or not. This Court's ruling in *Baze* makes it clear that constitutionality is evaluated according to what methods are available, not according to hypothetical methods that are unavailable. Under *Baze*, the only way to evaluate whether a method of execution is constitutional is to determine whether other available methods significantly reduce a demonstrated risk of serious harm that exists with the challenged method. Therefore, there could

be no situation where a method of execution is per se unconstitutional *without* reference to alternatives, except in the specific case of torturous methods specifically listed in *Baze* or methods that are utilized for the express purpose of inflicting pain. A known and available alternative is a necessary tool that allows courts to determine whether an execution method is constitutional. Without that constraint, any number of absurd situations could be contemplated, where condemned inmates argue that the only proper method of execution would be an impossible or non-existent option thereby effectively thwarting the death penalty.

By asking this Court to not require that showing, Petitioners seek to hamstring reviews of protocols, and set themselves or the courts up as boards of inquiry, determining best practices for executions. This is an untenable and unworkable proposal, and should be rejected by this Court.

CONCLUSION

The petition for writ of certiorari should be denied, and Petitioners' accompanying motion for stay of execution, should be denied. The determinations of the Tenth Circuit and the district court should be affirmed.

Respectfully submitted,

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